PHILEOALLIED BANK (M) BHD

v.

NARENDRAN THAMBIMUTHU

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-24-1052-1997]
2 MARCH 1999

LAND LAW: *Charge - Order for sale - Cause to the contrary - How to establish - What must chargee prove to obtain order for sale - Duty of care owed by chargee to chargor - Consent judgment obtained against chargor stating land to be sold within six months not acted on by chargee - Whether chargee not obliged to sell land - Whether chargee must at least consider to sell property within stipulated period - Whether chargee may now obtain order for sale - Whether chargee's failure to act amounts to cause to the contrary - National Land Code 1965, s. 256(3)*

LAND LAW: *Charge - Order for sale - Cause to the contrary - Consent judgment obtained against chargor stating land to be sold within six months - Chargee drew up order only five years later - Whether delay must be explained - Whether failure to explain delay amounts to cause to the contrary*

The plaintiff bank applied pursuant to s. 256(3) of the National Land Code 1965 ('the NLC') for an order for sale of a particular property charged to it to secure certain loan facilities granted to the defendant. Prior to this application, on 27 April 1992, a consent judgment was entered in favour of the plaintiff as the defendant failed to repay the said loan facilities. It was a term of the consent judgment that the proceeds of the sale of the said property were to be paid to the plaintiff within six months from the date of the consent judgment. However, the plaintiff took no steps to act on the consent judgment and only now applied for an order for sale thereby causing the amount owed by the defendant to increase significantly as a result of accrual of interest. The defendant resisted this application by contending that the plaintiff's failure to act on the consent judgment amounted to "cause to the contrary" under s. 256(3) of the NLC. The plaintiff, on the other hand, argued that as a creditor, it was not obliged to do anything and thus it was not under a duty to exercise its power of sale over the said property at any particular time.

Held:

[1] "Cause to the contrary" within s. 256(3) of the NLC may be established only in the following three categories of cases: (i) when a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the NLC; (ii) when a chargor can demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor can demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no "cause to the contrary" can be shown, the court would be obliged to make an order for sale.

[2] On an application for sale of land charged, the court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether "cause to the contrary" has been shown. The chargee must not only come to court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order.

[3] The duty of care of a chargee towards a chargor would be, as far as possible, to make the chargor repay as little as possible, or to allow the chargor to have as much surplus as possible after the sale of charged land. However, this duty was not discharged. Further, by failing to do anything from the time consent judgment had been obtained, the plaintiff was neither free from fault nor innocent of any unreasonable conduct. These facts show "cause to the contrary".

[4] What the defendant contended was that there already was a consent order whereby the plaintiff agreed that the proceeds of the sale of the said property was to be paid to the plaintiff within six months from the date of the consent order at the market price acceptable to the plaintiff. Therefore, in order for the plaintiff to be able to ascertain the market value acceptable to it, the plaintiff ought to have produced evidence in rebuttal to the claim of "cause to the contrary" that it had indeed received the market value and that such a valuation was unacceptable to it. The plaintiff at least owes a duty to the borrower to consider the fact as to whether or not the property should be sold at that time.

[5] By O. 42 r. 10 of the Rules of the High Court 1980, it was the plaintiff's duty to have drawn up the order although on its failure to do so the defendant could have also done so. In the instant case, the plaintiff only opted to draw up the order many years later. The reason for this delay must be explained and the failure to do so also gives rise to a "cause to the contrary".

[Application dismissed.]

Case(s) referred to:

Bank Bumiputra Malaysia v. Galian Saham Sdn Bhd & Ors [1990] 1 CLJ 58 ***(foll)***

Brutan Investments Pty Ltd v. Underwriting & Insurance Ltd & Anor [1982] 39 ACTR 47 ***(refd)***

China & South Sea Bank Ltd v. Tan Soon Gin @ George Tan [1990] 1 AC 536 ***(refd)***

Keppel Finance Ltd v. Phoon Ah Lek [1994] 3 MLJ 26 ***(dist)***

Kheng Soon Finance Bhd v. MK Ratnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384 ***(foll)***

Low Lee Lian v. Ban Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

Public Bank Berhad v. Ng Chee Ping & Anor [1999] 2 CLJ 505 ***(refd)***

R.D Werner & Co Inc v. Bailey Aluminium Products Pty Ltd [1988] 80 ALR 134 ***(refd)***

United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1982] CLJ 547 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 256(3), 340

Rules of the High Court 1980, O. 42 r. 10

Other Source(s) referred to:

The Malaysian High Court Practice 1999 Desk, edn, vol 1

For the plaintiff - SP Phang; M/s Albar Zulkifly & Yap

For the defendant - RS Sodhi (S Alagendra with him); M/s N Saraswathy Devi

Reported by S Dharmendran

JUDGMENT

RK Nathan J:

Facts

The defendant is the registered owner of land held under H.S.(D) 6002, Lot 7092, P.T. No. 174, Daerah Hulu Langat, Mukim Cheras, Negeri Selangor (the said land). The plaintiff granted two loan facilities to the defendant, namely:

(i) Term loan account facility of RM240,000 granted on 30 November 1985; and

(ii) Temporary loan account facility of RM50,000 granted on 19 July 1986.

Both the said loan facilities were secured by a charge over the said property. When the defendant defaulted in re-payment the plaintiff filed a suit against the defendant in the High Court at Kuala Lumpur being Civil Suit No. D1-22-705-1990. A consent judgment was entered in favour of the plaintiff on 27 April 1992.

The Consent Judgment

It is necessary to reproduce the terms of the consent judgment which reads as follows:

IT IS FURTHER ADJUDGED BY CONSENT that:

1) To record consent judgment as per the prayers in the Summons In Chambers dated 22.1.91;

2) partial settlement of the consent judgment is to be by way of sale of the property known as H.S.(D) 6002, P.T. No. 174, Lot 7092, Daerah Hulu Langat, Mukim of Cheras (hereinafter referred to as "the said property") at the market price acceptable to the Bank;

3) the proceeds of the sale of the said property to be paid directly to the Plaintiff or to the Plaintiff's solicitors within 6 months from the date of the consent judgment order;

4) payment of the balance of the consent judgment sum after deducting the proceeds of sale of the said property and the interest accrued on the said sum till date of final settlement to be paid by the Defendant within 3 years from the date of the receipt of the proceeds of sale by 36 equal monthly instalment payments;

5) all legal fees and other expenses incurred/to be incurred including solicitor-client costs/fees to be borne by the Defendant;

6) in the event the Defendant fails to comply with any of the abovementioned terms the Plaintiff is at liberty to commence execution proceedings forthwith against the Defendant.

Case For The Plaintiff

The plaintiff's claim is for an order for sale of the said land pursuant to s. 256(3) of the National Land Code (the NLC) for repayment of:

(i) The term loan account which has since escalated to RM950,389.19 as at 31 March 1997; and

(ii) Temporary loan account which has risen to RM184,130.77 as at 31 March 1997.

Case For The Defendant

The defendant also relies on the same sub-s. (3) and argues that since there is a "cause to the contrary" readily available to him this application ought to be dismissed.

Findings Of The Court

Cause To The Contrary

In *Low Lee Lian v. Ban Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 the Court of Appeal held that "cause to the contrary" within s. 256(3) of the NLC might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the NLC; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no "cause to the contrary" could be shown, the court would be obliged to make an order for sale. The question I have to decide is whether the defendant has succeeded in raising a "cause to the contrary" falling within any one of the said three categories.

In order for this court to assess the facts presented and thereby to be able to ascertain if a "cause to the contrary" has been established the Federal Court had in *Kheng Soon Finance Bhd v. MK Ratnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 held that on an application for sale of the land charged the court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether a "cause to the contrary" has been shown or not in accordance with s. 256(3) of the NLC. The chargee must not only come to court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order.

Failure To Act On The Consent Judgment

The main grouse of the defendant is that the plaintiff had failed to act on the consent judgment. It was argued that although consent judgment was entered on 27 April 1992, a copy of the order was only served on the defendant together with a covering letter, on 20 June 1997. There is no correspondence or affidavit evidence to show that the plaintiff's failure to act on the consent order was at the request of the defendant. The fact that the plaintiff had taken no steps to act on the consent order till this application for sale, has not been denied. There is no doubt that the failure to act on the consent order had caused the accrual of interest from 1992, and as at 8 January 1999 the plaintiff is claiming RM1,385,878 that is, an additional sum amounting to RM887,552.90.

It is also to be noted that the defendant has filed in the Kuala Lumpur High Court by way of Civil Suit No. S5-22-763-98 (the S5 suit) a claim for damages in negligence on the part of the plaintiff for failing to act on the consent order and thereby causing the defendant to suffer loss. A copy of this writ has been exhibited in the defendant's affidavit in reply to this application.

Plea Of Negligence

At this stage of the proceedings it is not my lot to decide if there is negligence. The court's duty is to adjudge if a "cause to the contrary" has been established pursuant to s. 256(3) of the NLC. In *Public Bank Berhad v. Ng Chee Ping & Anor* [1999] 2 CLJ 505; [1998] 4 AMR 3443 I had, in tandem with the decision of the Federal Court in *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] CLJ 547 [1983] 1 MLJ 185 taken the view that a mortgagee owes a duty of care to the borrower to take reasonable care to obtain a proper price. However, in the *Public Bank Berhad* case I was asked to consider if there was a duty of care owed by a receiver and manager to the borrower. In any case the decision of the Federal Court in the *Palm & Vegetable Oils* case clearly established that the consideration of the question as to whether such a duty of care exists, is in itself a triable issue and thus upholding the decision of the High Court in setting aside the summary judgment and allowing for unconditional leave to defend.

Having perused a copy of the writ exhibited in respect of the S5 suit I note the following particulars of negligence that had been pleaded against the bank:

PARTICULARS OF NEGLIGENCE

(a) Failing to take any or any sufficient steps to act on the terms of the Consent Judgment Order dated 27.4.1992.

(b) Failing to take any or any effective steps to cause the said property to be sold within the period of 6 months.

(c) Failing to take any or any effective steps to cause the proceeds of sale of the said property to be realised within a period of 6 months.

(d) Failing to take any action or any effective action to commence execution proceedings forthwith.

(e) Failing to file and/or extract and/or serve the Consent Judgment on the Plaintiff within a reasonable time.

Whether the defendant will succeed in establishing any one of these particulars is for that court to decide. In so far as this court is concerned it has been sufficiently shown to me that from the time the consent judgment had been

obtained, the plaintiff did nothing. Clearly in my view, the defendant has succeeded in raising a "cause to the contrary". I am further fortified in this view when I refer to the case of *Bank Bumiputra Malaysia v. Galian Saham Sdn Bhd & Ors* [1990] 1 CLJ 58; [1990] 1 MLJ 185 (which case incidentally I had also referred to in the *Public Bank* case) where Peh Swee Chin J (as he then was) said at p. 59:

> However, in view of the principle of neighbour-in-law of Lord Atkin of the *Donoghue v. Stevenson* ([1932] AC 562) fame, following the reasoning of Lord Denning in *Standard Chartered Bank* ([1982] 1 WLR 1410), in my view, the duty of care of a chargee towards a chargor would be to make it, as far as possible, for the chargor to repay as little as possible, or to have as much as possible any surplus after sale of charged land. Then, the next question to me was whether the plaintiff as chargor had been guilty of any breach of such duty of care.

Tying this to the decision in *Kheng Soon Finance Bhd* where the Federal Court stated in very clear terms that the applicant chargee must show that it is free of fault and that it is not guilty of any unreasonable conduct to enable it to obtain the order of sale, I am more than satisfied that a "cause to the contrary" has been shown.

The plaintiff relied on the Australian decision in *Brutan Investments Pty Ltd v. Underwriting & Insurance Ltd & Anor* [1982] 39 ACTR 47 where the court held that the duty of a mortgagee exercising power of sale is to act in good faith, that is, to act without fraud and without wilfully or recklessly sacrificing the interest of the mortgagor and that his duty does not require him to take reasonable care to obtain the true market value of the mortgaged property. It is obvious that the plaintiff has missed the point. Whether the plaintiff's conduct in sitting on his judgment when he was to sell the said property and pay the proceeds to itself within six months from the date of the consent order, is to be construed as wilful and reckless conduct leading to sacrificing the interest of the defendant, is not for this court to decide. So long as the defendant has raised the conduct of the plaintiff as an issue sufficient to fall into one of the three categories set out by the Court of Appeal in *Low Lee Lian (supra)* a "cause to the contrary" has been shown.

The plaintiff then referred me to the Privy Council decision in *China and South Sea Bank Ltd v. Tan Soon Gin @ George Tan* [1990] 1 AC 536 and relied on a passage from Lord Templeman at p. 545 which reads as follows:

> ... If a creditor chose to exercise his power of sale over the mortgaged security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale ... unless and until the creditor is paid in full ...

> The creditor is not obliged to do anything. ... No creditor could carry on the business of lending if he could become liable to a mortgagor ... for a decline in the value of the mortgaged property, unless the creditor was personally responsible for the decline. ... The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all.

The reliance by the plaintiff on this case is flawed. What the defendant is contending is that there already is a consent order whereby the plaintiff agreed that the proceeds of sale of the said property was to be paid to the plaintiff within six months from the date of the consent order at the market price acceptable to the bank. In order therefore for the plaintiff to be able to ascertain the market value acceptable to it, the bank ought to have produced evidence in rebuttal to the claim of "cause to the contrary" that it had indeed received the market value and that such a valuation was unacceptable to it. The plaintiff at least owes a duty to the borrower to consider the fact as to whether or not the property should be sold at that time. It is pertinent to note that the defence of a surety/borrower does not necessarily rest on contract or on tort but also upon a breach of equitable principles. Clearly the facts of the case before me are distinguishable from those in *Keppel Finance Ltd v. Phoon Ah Lek* [1994] 3 MLJ 26, also relied upon by the plaintiff, in that the present case rests on a consent judgment with precisely set terms.

Contractual Nature Of The Consent Order

In *R.D Werner & Co Inc v. Bailey Aluminium Products Pty Ltd* [1988] 80 ALR 134 the Federal Court of Australia held per curiam that based on the history of the negotiations, the consent order gave effect to a binding contract between the parties.

I accept this reasoning as sound. Further as was reasoned by their Lordships at p. 137:

> ... the agreement in this case was entered into two days before Ryan J was asked to make the consent order. This was not a case where agreement was reached in discussions at the door of the court:

The issue whether the consent order did give effect to a binding contract between the parties is one to be decided. After all it is open to parties to even agree to oust the jurisdiction of the court. In the circumstances if there is a contract then is the plaintiff in breach, by failing to act on the said consent order. These are questions that the civil suit ought to decide. On this ground too I find that the defendant has raised a "cause to the contrary".

Whose Duty Is It To Draw Up The Order

O. 42 r. 10 of the Rules of the High Court 1980 (the RHC) relates as to who should draw up the order. *The Malaysian High Court Practice 1999 Desk* edn. vol. 1 states in its commentary to O. 42 r. 10 of the RHC as follows:

> [42.10.1] Party who should draw up the order
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> The party in whose favour a judgment or order has been made and who wishes to have such judgment entered, must draw up the judgment or order. If that party fails to do so within seven days after it has been made, any other party affected by the order may draw up the same.

Clearly it was the plaintiff's duty to have drawn up the order although on its failure to do so the defendant could have also done so. But in this case five years later the plaintiff opted to draw up the order. The reason for this delay too must be explained, which again in my view gives rise to a "cause to the contrary".

Having therefore read all the authorities submitted I am satisfied that the defendant has raised a defence of "cause to the contrary" pursuant to section 256(3) of the NLC and that this application ought to be dismissed with costs.